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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

TRI-STATE EMPLOYMENT SERVICE, INC.,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT
INSURANCE APPEALS BOARD et al.,

Defendants and Respondents.

C084148

(Super. Ct. No.
34201680002391CUWMGDS)

Unemployment Insurance Code section 1241 allows an employer to bring an action to recover penalties related to unpaid or untimely unemployment contributions *if* the employer has fully paid the penalties and exhausted an administrative claim for refund.¹ Here, Tri-State Employment Service, Inc. (Tri-State) brought a petition for administrative mandate against the California Unemployment Insurance Appeals Board

¹ Undesignated statutory references are to the Unemployment Insurance Code.

(Appeals Board), Marty Block, successor to Robert Dresser, in his official capacity as the chairman of the Appeals Board, the Employment Development Department (EDD), and Patrick, Henning, Jr., in his official capacity as director of EDD (collectively, respondents). Tri-State relied on section 1241 to argue it should recover \$271,415.89 in penalties it paid without having to first fully pay the approximately \$1.4 million total penalty imposed by EDD for late payment of unemployment insurance contributions and for remitting payments by check rather than electronically. Tri-State further argued the entire penalty should be stricken as unfair. The trial court sustained the respondents' demurrer without leave to amend, and Tri-State appeals.

On appeal, Tri-State argues that (1) there was no procedural bar to the trial court reviewing and striking the interest and penalties in an action for administrative mandate under Code of Civil Procedure section 1094.5, (2) the trial court could also have considered the petition as one for traditional mandate under Code of Civil Procedure section 1085, (3) the trial court erroneously concluded section 1241 applies to bar prepayment challenges to interest and penalties imposed for untimely or improperly remitted employer contributions, (4) section 1241 does not impose a procedural bar on seeking writ relief because Tri-State was seeking to have the penalties stricken in the first place, and (5) the doctrine of collateral estoppel applied to estop respondents from demurring to Tri-State's writ petition.

We conclude section 1241 provides an adequate remedy at law that bars Tri-State's petition for writ of administrative mandamus before full payment of the contributions, penalties, and interest assessed by EDD. Collateral estoppel does not apply to the parties' earlier stipulation to administrative review because their stipulation was not a final judgment. Tri-State has not demonstrated it can amend its petition to cure its lack of compliance with section 1241. Accordingly, we affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL HISTORY

EDD Imposes Penalties

For six quarterly periods in 2011 and 2012, Tri-State made late payments on taxes. EDD imposed \$1,404,224.78 in penalties for the late payments. Of the penalties, \$234,000.00 was for failure to remit payments electronically (§ 1112, subd. (b)) and the remainder for failure to pay in a timely manner (§ 1112, subd. (a)). Tri-State asked EDD to waive the penalties on grounds of financial hardship and unfairness. EDD responded that lack of funds to pay amounts due did not constitute good cause of a waiver of the statutory penalties. EDD advised Tri-State: “If you do not agree with these findings, you must pay the balance in full and request a refund.”

EDD and the Appeals Board Decline to Exercise Jurisdiction

Tri-State requested an administrative hearing to challenge the penalties imposed by EDD. Even though Tri-State had not fully paid the penalties, EDD conducted a hearing before an administrative law judge in January 2013. In February 2013, the administrative law judge dismissed the petition for lack of jurisdiction on grounds Tri-State had not yet paid the full \$1.4 million in penalties. The Appeals Board affirmed the dismissal of the petition in July 2013. In affirming, the Appeals Board noted that “the petitioner is not without a remedy. The petitioner can pay the penalty and interest and then request for a refund. If the request is denied, the petitioner may file a petition to review the denial.”

Tri-State’s First Writ Petition

In September 2013, Tri-State filed its first petition for a writ of administrative mandate. (Code Civ. Proc., § 1094.5.) Tri-State relied on section 1241 to assert the trial court had jurisdiction to hear the writ petition. In its prayer for relief, Tri-State did not request that the trial court strike the penalties but only for a declaration that “Tri-State is entitled to a hearing before the ALJ on the merits of whether there is good cause for a

waiver of the \$1.5 million penalty without Tri-State paying the penalties prior to the hearing.”

At some point while the petition was pending, Tri-State paid \$271,415.89 toward the penalties that EDD had imposed. The Appeals Board filed a demurrer in which it argued the trial court lacked jurisdiction under sections 1241 and 1851 as well as under California Constitution, article XIII, section 32 (section 32).² The trial court overruled the demurrer. The trial court stated that “both section 32 and [s]ection 1851 only mention collection of tax or contributions, they do not mention penalties. [¶] The cases holding that a penalty is part of a tax are distinguishable, based on the language in the applicable tax/penalty statutes.” The trial court, however, did not discuss the application of section 1241.

The parties entered into a stipulation to remand of the matter for an administrative hearing on the merits. In pertinent part, the stipulation stated the matter was remanded “to the jurisdiction of the [Appeals Board] for a new hearing before an Administrative Law Judge (‘ALJ’) for consideration and a decision on the merits of Tri-State’s appeal of the EDD’s decision denying a waiver of over \$1.5 million in penalties; [¶] . . . Tri-State shall not be required to pay any penalties or interest assessed against it in whole or in part before such consideration and a final administrative decision on the merits”³ The stipulation was entered as an order by the trial court. The order provided that “Tri-State

² Respondents’ request for judicial notice of its demurrer to Tri-State’s first petition for administrative mandate is granted. (Evid. Code, §§ 452, subd. (d), 459.)

³ The parties’ stipulation does not make clear whether the interest and penalties were merely tolled while continuing to accrue in the event of an unfavorable determination for Tri-State, or whether further interest and penalties would not accrue at all during the stipulated administrative process. We are not called to consider this ambiguity and express no opinion on the matter.

reserves all rights to seek review of and appeal any acts or decisions by the ALJ and/or the [Appeals Board] if necessary”

In October 2015, a second administrative hearing was conducted. The hearing culminated with the administrative law judge’s issuance of a decision in which she struck the penalties for not submitting the tax electronically. However, the administrative law judge upheld the late penalties for payments that were submitted more than 31 days late. In reaching these conclusions, the administrative law judge noted that “because this is a matter being heard by stipulated jurisdiction, by its very nature, it is not reflective of a body of law or prior guidelines that had been set by the [Appeals] Board on applicable cases.”

Both Tri-State and EDD appealed the administrative law judge’s decision to the Appeals Board. While EDD challenged the administrative law judge’s striking of the electronic payment method penalty, it did not appeal the striking of the penalties for payment delinquent by 30 or fewer days. The Appeals Board reversed the decision of the administrative law judge and reinstated the penalties for failing to submit the taxes electronically but affirmed the decision insofar as it denied Tri-State’s challenge to the penalties for payments made more than 31 days after being due.

Tri-State’s Second Writ Petition

In July 2016, Tri-State filed a new petition for writ of administrative mandamus. Tri-State asserted the trial court had jurisdiction to hear the matter under section 1241. Tri-State asked that the trial court strike the penalties as punitive and violative of constitutional due process guarantees. Tri-State also asked that the trial court order EDD to refund \$271,415.89 to Tri-state for the amount it had paid toward the penalties. The Appeals Board demurred to the petition on grounds Tri-State had an adequate remedy at law under section 1241. The Appeals Board further argued the trial court lacked

jurisdiction to grant writ relief before payment in full of the interest and penalties. (Cal. Const., art. III, § 5 & § 32.)

The trial court sustained the demurrer without leave to amend. In sustaining the demurrer, the trial court “noted that [Tri-State] itself has invoked section 1241 as a basis for its claims via the Petition.” Concluding section 1241 requires full payment of interest and penalties before an administrative mandate action may be brought for a refund, the trial court found Tri-State failed to allege facts sufficient to demonstrate compliance with section 1241. The trial court further found “that the stipulated judgment between the parties in [the first writ petition action] was concerning [Tri-State’s] efforts to compel an administrative hearing pertaining to the validity of the subject penalties. While it is possible the parties contemplated that such an administrative decision would be reviewable by the Court, [Tri-State] has acknowledged application of section 1241 in the subject Petition, rendering the stipulated judgment non-dispositive.” The trial court entered an order sustaining the demurrer from which Tri-State appealed. A judgment of dismissal was entered shortly thereafter.⁴

⁴ We deem “the premature and defective notice of appeal to have been filed immediately after, and as an appeal from, the ensuing judgment entered on the order sustaining the demurrer. (*Evola v. Wendt Const. Co.* (1958) 158 Cal.App.2d 658, 660–661; cf. *Elmore v. Oak Valley Hospital Dist.* (1988) 204 Cal.App.3d 716, 719, fn. 1.) No specific showing of ‘good cause’ is required for relief from a premature notice of appeal, particularly where respondent does not claim prejudice. (See *Larrus v. First National Bank* (1954) 122 Cal.App.2d 884, 886; see generally 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 414–415, pp. 411–413.) Respondent[s have] not moved to dismiss this appeal. We thus deem this appeal a timely one from the judgment of dismissal.” (*Smith v. County of Kern* (1993) 20 Cal.App.4th 1826, 1829, fn. 2.)

DISCUSSION

I

Standard of Review

“ ‘On appeal from a dismissal after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law.’ (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) ‘ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]’ ” (*Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 674, quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

As the petitioner for the writ, Tri-State “bear[s] the burden of demonstrating that the demurrer was sustained erroneously. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1485.) We will affirm the judgment if proper on any grounds stated in the demurrer, whether or not the trial court acted on that ground.” (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) However, if Tri-State can demonstrate reasonable probability that the defects in its petition can be cured by amendment, we must reverse the judgment of dismissal. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

II

Section 1241 Prerequisites for Legal Actions

Tri-State argues the trial court erred in relying on section 1241 to dismiss the petition for writ of administrative mandate. We disagree.

A.

The “Pay Now, Litigate Later” Rule

As a general rule, “[u]nder California law, a taxpayer may not obtain judicial review of the validity of a tax which is due but has not been paid. ([§ 32]; *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.) The underlying reason for this rule is that the prompt collection of tax revenue is vital to the functioning of government and the provision of essential public services. (*State Bd. of Equalization v. Superior Court*, *supra*, 39 Cal.3d at p. 638; *Pacific Gas & Electric Co. v. State Bd. of Equalization* [(1980)] 27 Cal.3d [277,] 283; *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 731–732 [*Modern Barber*].)” (*Chen v. Franchise Tax Bd.* (1998) 75 Cal.App.4th 1110, 1114–1115, fn. omitted (*Chen*).) The provision of section 32 has been called the “ ‘pay now, litigate later’ rule in tax cases.” (*Milhous v. Franchise Tax Bd.* (2005) 131 Cal.App.4th 1260, 1265-1266.)

The “pay now, litigate later” rule, as it applies to this case, has been codified in section 1241. Thus, the merit of Tri-State’s argument depends on the meaning of section 1241. The California Supreme Court has explained that on “ ‘all questions of statutory interpretation, we attempt to discern the Legislature’s intent, “being careful to give the statute’s words their plain, commonsense meaning. [Citation.] If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature’s intent is unnecessary.” ’ ” (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 713, quoting *Ste. Marie v. Riverside County Regional Park & Open–Space Dist.* (2009) 46 Cal.4th 282, 288.)

In its entirety, section 1241 provides: “No suit or proceeding shall be maintained in any court *for the recovery of any amount of contributions, interest or penalties* alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been filed pursuant to this chapter. Within 90 days after the service of the

notice of the decision of the appeals board upon an appeal, the claimant may bring an action against the director on the grounds set forth in the claim in a court of competent jurisdiction in the County of Sacramento for the *recovery* of the whole or any part of the amount with respect to which the claim has been denied. The director may, in writing, extend for a period of not exceeding two years the time within which such action may be instituted if written request for such extension is filed with the director within the 90-day period. Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments. If the appeals board fails to serve notice of its decision on the appeal within 90 days after an appeal is filed, the claimant may consider the claim denied and may bring an action against the director under this section.” (§ 1241, subd. (a), italics added.)

The italicized portions of section 1241 compel three conclusions regarding the scope of statutory prerequisites for challenging interest and penalties imposed by EDD. First, section 1241 unambiguously applies to interest and penalties by expressly including, “any amount of contributions, interest or penalties.” Second, an action may be brought in the trial court only after payment of interest and penalties because section 1241 limits actions for “recovery” of amounts paid. Third, the interest and penalties must be paid in full prior to the filing of an action. Section 1241 specifically bars any “suit or proceeding,” even for a portion of the amount due, by referring to the amount “assessed” – not the amount already paid.

Here, EDD assessed more than \$1.4 million in penalties, but Tri-State paid only \$271,415.89 of that amount. Section 1241 bars the petition for administrative mandate because Tri-State has not complied with the requirement to pay contributions, interest, and penalties in full before bringing any action in court to challenge them. Consequently, the trial court correctly sustained the respondents’ demurrer.

Tri-State argues that only taxes, not interest or penalties, must be paid in full before an action may be brought against EDD. In support, Tri-State relies on *Agnew v. State Board of Equalization* (1999) 21 Cal.4th 310, *Chen, supra*, 75 Cal.App.4th 1110,⁵ and section 1112. We determine these authorities to be inapposite. *Agnew* and *Chen* are inapposite because they addressed only whether interest must be paid on a tax before challenging *the tax*; not whether interest must be paid before being able to challenge that interest. (*Agnew, supra*, at pp. 313-314 [whether payment of interest is precondition to challenge of tax on which interest accrued]; *Chen, supra*, at p. 1263 [same].)

We are also not persuaded by Tri-State's reliance on section 1112, the section under which the penalties were imposed. In pertinent part, section 1112 provides: “(a) Any employer who without good cause fails to pay any contributions required of him or her or of his or her workers [with exceptions not pertinent here] within the time required shall pay a penalty of 15 percent of the amount of those contributions. [¶] (b) Any employer required to remit payments electronically who without good cause remits those amounts by means other than electronic shall pay a penalty of 15 percent of the amount of those contributions.” (§ 1112.) While section 1112 imposes penalties for late payment and failure to remit payments electronically, it does not address whether or how employers may challenge the penalties. Instead, the manner of challenging by legal action any penalties imposed by EDD is governed by section 1241. And, as we have explained, section 1241 precludes legal action before full payment of contribution, interest, and penalties.

⁵ Superseded by statute on grounds not pertinent to this decision. (See *Milhous v. Franchise Tax Bd.*, *supra*, 131 Cal.App.4th at p. 1266.)

B.

Availability of Mandate

Tri-State argues section 1241 does not bar its petition for a writ of administrative mandamus. Alternatively, Tri-State argues we should deem its writ to have been one for traditional mandate under Code of Civil Procedure section 1085. We are not persuaded.

In addressing Tri-State's arguments, we benefit from the guidance of the California Supreme Court in *Modern Barber, supra*, 31 Cal.2d 720. *Modern Barber* involved a mandate action brought to challenge whether students and a bookkeeper for a putative barber college were employees for whom the petitioner owed taxes as an employer. (*Id.* at p. 722.) The action was dismissed after the taxing authority demurred to the writ petition. (*Id.* at pp. 722-723.) The Supreme Court affirmed the dismissal based on former section 45.11, subdivision (d), of the Unemployment Insurance Act (Stats. 1935, ch. 352, §§ 1-111, pp. 1226-1245), which stated: “ ‘No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contributions sought to be collected.’ ” (Quoted in *Modern Barber, supra*, at p. 723.)

The *Modern Barber* court held the “proceeding in mandamus is prohibited by the statute” and required the denial of the writ petition. (31 Cal.2d at p. 723.) In so holding, the Supreme Court rejected “the contention that petitioner is entitled to mandamus solely on the ground that his remedy at law is allegedly inadequate.” (*Id.* at p. 724.) The Supreme Court noted a lack of any authority for the proposition “that mandamus may be issued despite an express statutory prohibition merely because the court may deem the normal remedy less satisfactory than mandamus. Such a holding would, as stated above, be equivalent to declaring the statute unconstitutional” (*Id.* at pp. 724-725.) The Legislature, however, has the prerogative to limit resort to

mandate when it provides a statutorily delineated method of challenging a tax assessment. (*Id.* at p. 725.)

Requiring employers to pay assessed taxes before being allowed to bring challenges to the taxes in court does not violate due process. As *Modern Barber* explained, “The due process clause does not guarantee the right to judicial review of tax liability before payment. The power of a state to provide the remedy of suit to recover alleged overpayments as the exclusive means of judicial review of tax proceedings has long been unquestioned.” (31 Cal.2d at pp. 725-726.) Applying the holding of *Modern Barber* to the circumstances of this case compels the conclusion that both administrative and traditional mandamus are unavailable to Tri-State before it complies with the prerequisite in section 1241 to pay the entire contribution, interest, and penalties owed. Consequently, the trial court correctly granted the demurrer without leave to amend.

III

Collateral Estoppel

Tri-State argues the doctrine of collateral estoppel applies to bar respondents from asserting the same reliance on section 1241 as in the first writ petition brought by Tri-State. We disagree.

Collateral estoppel precludes relitigation of issues argued and decided in a prior legal proceeding. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) “Under the doctrine of collateral estoppel or issue preclusion, when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a future lawsuit. (*Ashe v. Swenson* (1970) 397 U.S. 436, 443 [25 L.Ed.2d 469].) The doctrine promotes judicial economy by minimizing repetitive litigation, prevents inconsistent judgments, which may undermine the integrity of the

judicial system, and protects against vexatious litigation.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 249.)

Here, collateral estoppel does not apply to bar the dismissal of Tri-State’s second writ petition under section 1241 because the applicability of section 1241 was not conclusively resolved in a final judgment in the first writ proceeding. The trial court in the first writ proceeding overruled the respondents’ demurrer without entering a final judgment on the merits. (*De La Beckwith v. Superior Court of Colusa County* (1905) 146 Cal. 496, 501 [“We entertain no doubt as to the power of the court, at any time prior to final judgment in favor of a party, to reconsider a ruling sustaining his [or her] demurrer to a pleading”].) Instead of a judgment, the parties entered into a stipulation, entered as an order, that remanded the matter for an administrative hearing on Tri-State’s challenge to the interest and penalties imposed by EDD. For lack of a final judgment, collateral estoppel does not apply.⁶

IV

Leave to Amend

Tri-State asserts it can amend the petition to state a valid cause of action against the respondents. We are not persuaded.

When a demurrer is sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Here, Tri-State does not assert it can plead full payment of penalties – the statutory prerequisite to maintenance of its writ petition. (§ 1241, subd. (a).) Instead, Tri-State asserts it

⁶ Because equitable relief is unavailable to Tri-State, we do not reach the merits of its remaining arguments, which go to the validity of the tax.

can amend by bringing the writ for traditional writ under Code of Civil Procedure section 1085. Having determined Tri-State may not seek administrative *or* traditional writ relief, we conclude Tri-State's proposed amendment would not state a viable cause of action against the respondents. (See *Modern Barber, supra*, 31 Cal.2d at pp. 724-725.) Accordingly, the trial court properly sustained the demurrer without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Respondents California Unemployment Insurance Appeals Board, Marty Block, successor to Robert Dresser, in his official capacity as the chairman of the California Unemployment Insurance Appeals Board, the Employment Development Department, and Patrick Henning, Jr., in his official capacity as director of the Employment Development Department shall recover their costs, if any, on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

_____/s/
HOCH, J.

We concur:

_____/s/
ROBIE, Acting P. J.

_____/s/
DUARTE, J.